

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TERRELL CROSS,

No. C 07-3941 WHA (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS AND
CERTIFICATE OF
APPEALABILITY**

v.

D. K. SISTO, Warden,

Respondent.

INTRODUCTION

Petitioner, a California prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus challenging his conviction pursuant to 28 U.S.C. 2254. Respondent was ordered to show cause why the writ should not be granted based upon petitioner's claims. Respondent has filed an answer and a memorandum of points and authorities in support of it, and petitioner filed a traverse. For the reasons set forth below, the petition is **DENIED**.

STATEMENT

Petitioner was charged in Alameda County Superior Court of murder, possession of a firearm by a felon, and two counts of assault with a deadly weapon. *See* Cal. Pen. Code §§ 187, 12021(a), 245(a)(2). The assault charges were not included in the original preliminary hearing, but were later added by information. *See* Cal Pen. Code § 739. The charges stemmed from an

1 incident in which petitioner shot and killed John McClendon.

2 The basic facts of the incident are not in dispute. At around 10:45 p.m. on December 24,
3 1999, petitioner met McClendon and several other men on a street corner in Oakland,
4 California. McLendon and the others insulted and argued with petitioner, then they left and
5 came back about 45 minutes later. Petitioner asked McClendon for “2 for 15,” which meant
6 two \$10 bags of marijuana for \$15, and McClendon refused and walked away. Petitioner shot
7 McClendon in the back of the head from close range with a pistol, and McLendon’s friend
8 Ronald Salter shot petitioner in the arm. Eyewitness accounts differ on who fired first, but
9 McClendon was unarmed at the time of his death.

10 At trial, petitioner asserted that he killed McClendon in self-defense, claiming that he
11 was scared of McClendon because he had a history and reputation of violence. A jury
12 convicted petitioner of second-degree murder, possession of a firearm by a felon, two counts of
13 assault with a deadly weapon, and enhancements for six prior convictions. The trial court
14 sentenced petitioner to a term of 54 years-to-life in state prison. The California Court of Appeal
15 affirmed the conviction, and the California Supreme Court summarily denied a petition for
16 review.

17 ANALYSIS

18 I. STANDARD OF REVIEW

19 A district court may not grant a petition challenging a state conviction or sentence on the
20 basis of a claim that was reviewed on the merits in state court unless the state court’s
21 adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an
22 unreasonable application of, clearly established Federal law, as determined by the Supreme
23 Court of the United States; or (2) resulted in a decision that was based on an unreasonable
24 determination of the facts in light of the evidence presented in the State court proceeding.” 28
25 U.S.C. 2254(d). The first prong applies both to questions of law and to mixed questions of law
26 and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong
27 applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340
28 (2003).

Under 28 U.S.C. 2254(d)(2), a state court decision “based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322 at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

When there is no reasoned opinion from the highest state court to consider the petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000). In this case, the last reasoned opinion to address petitioner’s claim is that of the California Court of Appeal.

II. PETITIONER’S CLAIMS

As grounds for federal habeas relief, petitioner has eight remaining claims: 1) the trial court’s exclusion of evidence regarding a handgun violated his right to due process, 2) denial of petitioner’s motion to dismiss the two assault charges not originally included in the preliminary hearing violated his Fifth Amendment and due process rights, 3) petitioner’s constitutional right to a jury of his peers was violated by the absence of African-Americans on the jury, 4) trial counsel’s failure to investigate and call certain witnesses violated his Sixth Amendment right to effective assistance of counsel, 5) prosecutor’s statement to the newspaper violated his due process rights, 6) appellate counsel’s failure to raise the previous five claims on appeal violated petitioner’s Sixth Amendment rights, 7) the trial court’s exclusion of evidence regarding McClendon’s admission to a previous murder violated petitioner’s due process rights, and 8) trial counsel’s failure to inform petitioner of the consequences of a plea deal violated his Sixth Amendment rights.

1. Exclusion of Hand Gun Evidence

Petitioner contends that the trial court’s failure to admit evidence regarding the pistol used by Salter during the incident violated his due process rights because it hampered his self-defense claim. Petitioner, during an in limine motion, claimed that the pistol used during the shootout by Salter was used to kill another man three days earlier. Petitioner wanted to use that evidence to show that McClendon and Salter were violent and dangerous. The trial court

1 refused to admit the evidence.

2 Whether grounded in the Sixth Amendment's guarantee of compulsory process or in the
3 more general Fifth Amendment guarantee of due process, "the Constitution guarantees criminal
4 defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South*
5 *Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683 690 (1986)).
6 The constitutional right to present a complete defense includes the right to present evidence.
7 *See Washington v. Texas*, 388 U.S. 14, 19 (1967). But the right is only implicated when the
8 evidence the defendant seeks to admit is "relevant and material, and . . . vital to the defense."
9 *Id.* at 16. Moreover, a violation of the right to present a defense merits habeas relief only if the
10 error was likely to have had a substantial and injurious effect on the verdict. *Lunbery v.*
11 *Hornbeam*, 605 F.3d 754, 762 (9th Cir. 2010) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-
12 38 (1993)).

13 Under California law, a valid claim of self-defense claim to a murder charge requires the
14 defendant to have an honest and reasonable belief that great bodily injury is about to be inflicted
15 upon him. *See People v. Minifie*, 56 Cal. Rptr. 2d 133, 137 (Cal. 1996). A defendant's own
16 state of mind during the incident may be shown to be reasonable in part by the reputation for
17 violence of the victim or his associate group. *Id.*

18 This claim was not brought before the California Court of Appeal, but it was raised
19 before the California Supreme Court, which summarily rejected the claim. The denial of this
20 claim conforms with existing United States Supreme Court precedent because the gun evidence
21 was not relevant. It was never proven that McClendon or Salter committed the prior murder or
22 used the gun in that murder. In addition, the history of a gun that *Salter* fired in this incident
23 does not bear on the character or past actions of *McClendon*. As such, the evidence about the
24 gun does not show that McClendon has a history of violence. Moreover, even if evidence of
25 the history of the gun that Salter used were relevant to petitioner's claim, any error in excluding
26 the evidence is harmless under the *Brecht* standard. Petitioner had successfully introduced
27 evidence that McClendon was charged with the prior murder, which charges were later
28 dismissed. This was far more powerful evidence of McClendon's violent nature than the

1 history of the gun used by Salter. As the gun evidence was irrelevant and its exclusion did not
2 have a substantial or injurious effect on the verdict, habeas relief is not warranted on this claim.

3 **2. Denial of Motion to Dismiss Assault Charges**

4 Petitioner claims the trial court violated his Fifth and Fourteenth Amendment rights by
5 denying a defense motion to dismiss two counts of assault with a deadly weapon because they
6 had not been included in the original indictment. The Fifth Amendment to the Constitution
7 provides that, except for certain military cases, "no person shall be held to answer for a capital,
8 or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Bill
9 of Rights, including the Fifth Amendment, applies directly only to the federal government. *See*
10 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Prosecution by indictment has long been held
11 *not* to be required of the states by the Due Process Clause. *See Hurtado v. California*, 110 U.S.
12 516, 538 (1884). As the Supreme Court has never incorporated the Fifth Amendment
13 requirement of prosecution by indictment into the Due Process Clause of the Fourteenth
14 Amendment, California was not required to include the two assault charges in the indictment.
15 These charges were later added by information, which is constitutional. The state courts did not
16 violate Supreme Court precedent by denying this claim. Accordingly, habeas relief is not
17 warranted.

18 **3. Composition of the Jury**

19 Petitioner claims that he was denied his constitutional right to a trial by an impartial jury
20 under the Fifth, Sixth, and Fourteenth Amendments because his jury included no African-
21 Americans. He complains that while East Oakland is 85-90% black, yet only 12% of the jury
22 pool was black (*id.* at 13).

23 A criminal defendant has a constitutional right stemming from the Sixth Amendment to
24 a fair and impartial jury pool composed of a cross section of the community. *See Holland v.*
25 *Illinois*, 493 U.S. 474, 476 (1990). The fair cross section requirement applies only to the larger
26 jury pool or venire and is not applicable to petit juries. *See Lockhart v. McCree*, 476 U.S. 162,
27 173-74 (1986). In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the Supreme Court held that to
28 establish a *prima facie* violation of the fair cross section requirement, a defendant must show

1 that "(1) the group alleged to be excluded is a 'distinctive' group in the community; (2) that the
2 representation of this group in venires from which juries are selected is not fair and reasonable
3 in relation to the number of such persons in the community; and (3) that this under-
4 representation is due to systematic exclusion of the group in the jury-selection process."

5 The first showing easily is made in most cases, while the second and third are more
6 likely to generate controversy. *Berghuis v. Smith*, 130 S. Ct. 1382, 1393 (2010). The second
7 *Duren* requirement is that the group not be fairly represented in the venire from which the petit
8 jury was chosen. "The second prong . . . requires proof, typically statistical data, that the jury
9 pool does not adequately represent the distinctive group in relation to the number of such
10 persons in the community." *Esquivel*, 88 F.3d at 726. The third *Duren* requirement is that the
11 underrepresentation result from a systematic exclusion of the group in the jury selection
12 process. Under the third prong, the disproportionate exclusion need not be intentional to be
13 unconstitutional, but it must be systematic. *See Randolph v. California*, 380 F.3d 1133, 1141
14 (9th Cir. 2004).

15 In rejecting petitioner's claim, the California Supreme Court did not violate existing
16 Supreme Court precedent. While African Americans are undoubtedly a distinctive group,
17 petitioner does not explain any systematic exclusion of African Americans from the jury pool or
18 the petit jury. He does not cite any action by the prosecution, such as peremptory challenges, or
19 by the state in selecting the jury pool that led to the absence of African Americans on his jury.
20 Furthermore, petitioner's claim that African-Americans were under-represented in the jury pool
21 lacks proof. His assertion that East Oakland is "85-90% black" is unsubstantiated by any
22 evidence in the record, nor does petitioner account for the percentage of those citizens
23 unqualified to serve as jurors or the no-show rate. As petitioner's claim fails on *Duren*'s second
24 and third prongs, he is not entitled to habeas relief.

25 4. Ineffective Assistance of Counsel in Investigating Witnesses

26 Petitioner claims trial counsel provided him with ineffective assistance because of his
27 failure to investigate and call witnesses, in violation of his Sixth Amendment rights. Petitioner
28 asserts that before trial he asked his lawyer to seek out and interview two witnesses to the

shooting, Anthony Brown and Clinton Dykes. Petitioner found the two using alternate means and acquired a sworn affidavit from Mr. Dykes but not from Mr. Brown.

A claim of ineffective assistance of counsel requires a showing both that counsel's performance was deficient and that the deficiency resulted in prejudice to the defendant. *Hurles v. Ryan*, 706 F.3d 1021, 1030 (9th Cir.2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Establishing deficient performance “requires a showing that trial counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms.” *Id.* Establishing prejudice requires a showing of “a reasonable probability that ‘but for counsel's unprofessional errors, the result of the proceeding would have been different.’” *Hurles*, 706 F.3d at 1031 (quoting *Strickland*, 466 U.S. at 694).

Petitioner fails to show how counsel’s failure to investigate the two witnesses resulted in prejudice to him. Petitioner admits that he has been unable to locate Anthony Brown. Therefore, it is unknown whether he would have given favorable testimony, what the nature of that testimony would have been, or whether he would have been able to testify at all. Clinton Dykes’s affidavit contains no new evidence supporting petitioner’s claim of self defense. Mr. Dykes states that petitioner talked to McClendon, that “something was going down,” and that McClendon then fell to the ground while petitioner stood over him yelling (Pet. Exh. A). There was an exchange of gunfire, and then Mr. Dykes fled (*ibid.*). This account does not substantially differ from the testimony by other witnesses, and it does not favor petitioner’s self-defense theory. As a result, petitioner has not shown a reasonable likelihood that counsel’s investigation of these two witnesses would have made a difference in the verdict. The California Supreme Court’s denial of this claim comports with Supreme Court precedent, and habeas relief is not warranted on this claim.

5. Prosecutor’s Statement to the Newspaper

Petitioner claims the prosecutor committed misconduct by commenting to a newspaper on the day before giving closing arguments that: “Common sense and the facts make clear that this was a premeditated murder Mr. Cross executed an unarmed man because of bravado and wounded pride” (Pet. Exh. B). Petitioner moved for a mistrial. The prosecutor defended

1 himself by saying he tried to get the newspaper to delay publishing the article, and after
2 confirming this fact, the trial court denied the motion, citing its admonishments to the jury to
3 avoid reading newspaper articles (Ans. 14).

4 Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate
5 standard of review is the narrow one of due process and not the broad exercise of supervisory
6 power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant's due process rights are
7 violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Ibid.*; *Smith v.*
8 *Phillips*, 455 U.S. 209, 219 (1982). The first factor in determining misconduct amounted to a
9 violation of due process is whether the trial court issued a curative instruction. When a curative
10 instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and
11 that no due process violation occurred. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987). Courts
12 also look at the weight of the evidence of guilt. *See, e.g., United States v. Young*, 470 U.S. 1, 19
13 (1985) (misconduct did not require new trial where "overwhelming" evidence of guilt); *United*
14 *States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (misconduct required new trial in light of
15 prior hung jury and lack of curative instruction).

16 The prosecutor should not have made comments to the newspaper about the case during
17 the trial. Nevertheless, in this case such comments did not render the trial fundamentally unfair
18 thanks to the jury instructions, the presumption that the jury followed such instructions, the
19 nature of the prosecutor's comments, and the very strong evidence of guilt. The jury was
20 instructed not to investigate the facts or consult reference works, and they are presumed to have
21 followed their instructions by not reading about the case in the newspaper. In addition, the
22 statements the prosecutor made to the newspaper were nearly identical to his closing arguments.
23 As a result, the jury would not have learned anything new from the comments. Finally, there
24 was strong evidence of petitioner's guilt at trial: it was not disputed that petitioner shot an
25 unarmed McClendon in the back of the head, and there was little credible evidence that
26 McClendon posed a reasonable threat of inflicting great bodily injury on petitioner at the time
27 of the shooting. The California Supreme Court did not violate Supreme Court precedent by
28 denying the claim that the prosecutor's comments rendered the trial fundamentally unfair.

1 Accordingly, habeas relief will not be granted on this claim.

2
3 **6. Appellate Counsel's Failure to Raise Above Claims**

4 Petitioner contends his appellate counsel rendered ineffective assistance by not raising
5 the above five claims on direct appeal. Petitioner claims he tried to contact counsel several
6 times to tell him that the claims were worthy of being raised on appeal (Trav. 19). Counsel's
7 ineffective performance only violates due process when there is "a reasonable probability that
8 'but for counsel's unprofessional errors, the result of the proceeding would have been
9 different.'" *Hurles*, 706 F.3d at 1031 (quoting *Strickland*, 466 U.S. at 694). As the five claims
10 mentioned have been found to be non-meritorious above, there can be no showing of prejudice
11 regarding counsel's failure to raise them on direct appeal. Accordingly, habeas relief is not
12 warranted on this claim.

13 **7. Limitation of Evidence Relating to Murder Charge Against McClendon**

14 Petitioner claims that his due process rights were violated when the trial court excluded
15 evidence regarding McClendon's alleged admission to petitioner that he committed a murder in
16 the past, and prevented the cross-examination of Salter about an alleged "false" alibi. Petitioner
17 sought to admit evidence that McClendon admitted and "bragged" that he committed a murder
18 in 1997, and that the gun he used in that murder was linked to the homicide that occurred three
19 days before petitioner killed McClendon. The trial court denied this request, and also sustained
20 an objection when defense counsel asked petitioner what McClendon had said to him regarding
21 the murder charge. However, the trial court did allow evidence that McClendon was charged
22 with the murder that occurred three days earlier and that those charges were later dismissed.
23 Petitioner also tried to cross-examine Slater that an alibi he provided for McClendon regarding
24 the 1997 murder charge was false. The trial court also denied cross-examination of Salter about
25 this "false" alibi because it was irrelevant and confusing.

26 "State and federal rule makers have broad latitude under the Constitution to establish
27 rules excluding evidence from criminal trials." *Holmes v. South Carolina*, 547 U.S. 319, 324
28 (2006) (quotations and citations omitted). This latitude is limited, however, by a defendant's

1 constitutional rights to due process and to present a defense, rights originating in the Sixth and
2 Fourteenth Amendments. *Ibid.* “While the Constitution prohibits the exclusion of defense
3 evidence under rules that serve no legitimate purpose or that are disproportionate to the ends
4 that they are asserted to promote, well-established rules of evidence permit trial judges to
5 exclude evidence if its probative value is outweighed by certain other factors such as unfair
6 prejudice, confusion of the issues, or potential to mislead the jury.” *Id.* at 325-26. Even if an
7 evidentiary error is of constitutional dimension, the court must consider whether the error was
8 harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

9 This claim was rejected by a reasoned opinion of the California Court of Appeal. That
10 court found that the limitations on the evidence and cross-examination “did not prevent the
11 [petitioner] from presenting evidence of the factual basis for his actual and reasonable fear of
12 McClendon, including other testimony concerning defendant’s knowledge of McClendon’s
13 reputation or character for violence” (Exh. F at 6-8). The appellate court reasoned that because
14 petitioner was able to introduce evidence of his knowledge of McClendon’s murder charge,
15 additional evidence of McClendon “bragging” about it to petitioner was cumulative (*ibid.*).
16 Such evidence may have also mislead and confused the jury into believing that it needed to
17 decide whether McClendon actually committed the prior murder (*ibid.*). Allowing cross-
18 examination of Salter regarding a false alibi he provided for a murder charged to McClendon
19 could similarly mislead the jury and confused them into thinking that they needed to decide
20 whether McClendon had committed a prior murder (*ibid.*). In addition, other evidence was
21 allowed to undermine Salter’s credibility, namely his friendship with McClendon and his
22 multiple prior convictions (*ibid.*).

23 The state appellate court’s reasoning is a sound interpretation of federal law. The
24 evidence of McClendon’s “bragging” was both cumulative of other evidence of petitioner’s
25 knowledge of McClendon’s violent past, and its probative value was outweighed by its potential
26 for misleading and confusing the jury. Likewise, the value of cross-examining Salter was
27 outweighed by its potential for confusing the issues for the jury to decide. Moreover, petitioner
28 was able to impeach him with other evidence. Accordingly, habeas relief will not be granted on

1 this claim.

2
3 **8. Counsel's Assistance Regarding Plea Bargain**

4 Petitioner claims his trial counsel failed to inform him of the consequences of accepting
5 or rejecting an alleged plea bargain. Petitioner claims that trial counsel came to him in the
6 "bull-pen" on the day the defense was to begin its arguments with a "one time offer from the
7 judge" for 21 years (Supp. Pet. 3). Counsel allegedly told petitioner he had less than two hours
8 to decide whether to accept or reject the offer (*id.* at 8). Petitioner complains that counsel did
9 not ask the court for more time to consider the plea, and that he advised petitioner to reject the
10 offer because it indicated that the judge thought the prosecution's case was weak (*ibid.*).

11 Although respondent raises issues of timeliness and retroactivity, this claim can be
12 denied on its merits. A claim of ineffective assistance of counsel requires a showing both that
13 counsel's performance was deficient and that the deficiency resulted in prejudice to the
14 defendant. *Strickland*, 466 U.S. at 687. To begin with, petitioner's claim that the offer was
15 made is not corroborated by any evidence in the record. Uncorroborated self-serving statements
16 by petitioners such as these are often insufficient to overcome the presumption of validity
17 accorded to state convictions. *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002). In any
18 event, even if the offer was made, petitioner has not shown that counsel's advice to reject the
19 offer violated the Sixth Amendment. Trial counsel merely made a judgment call comparing a
20 lengthy plea offer of twenty-one years with the potential for acquittal. Petitioner has not shown
21 that counsel's judgment that risking a longer sentence at trial was unreasonable, or that it was
22 against petitioner's expressed wishes. Petitioner's complaint that counsel should have asked the
23 court for more time to consider the offer also does not establish grounds for relief because he
24 does not explain what benefit more time would have yielded, there is no indication that counsel's
25 advice would have changed, and there is no reason to think that such a request would have been
26 granted where defense counsel was about to make their arguments to the jury. As petitioner has
27 not shown that counsel's conduct surrounding the alleged plea offer violated his Sixth
28 Amendment rights, he is not entitled to habeas relief on this claim.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**.

A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: October 24, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE